

# Don't Be Fooled by Autocrats!

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On 9 April, Vera Jourová, Vice President of the European Commission for values and transparency with lead responsibility for rule of law, gave an interview to Euronews on democracy in the pandemic. A journalist asked whether she believes that Hungary still qualifies as a democracy after the Enabling Act creating an indefinite state of emergency was enacted by the Hungarian Parliament on 30 March. [Her answer](#) was not reassuring:

This is a tricky question and I will not give you a direct answer. We will have to wait and see how the increased emergency powers of the government are applied. So far the Hungarian emergency law is comparable with other laws in EU.

Jourová has been too ready to rely on statements by Hungarian officials, including most prominently Hungarian Justice Minister Judit Varga, who keeps reassuring Jourová and others that the Hungarian Parliament and the Constitutional Court can supervise this emergency in an effective and constitutional way and that they can call off the emergency whenever they wish. Varga's statements are dangerously misleading. Orbán's emergency regime gives him unlimited legal power for as long as he wants to use it, and all apparent checks on his power are illusory.

## This is no ordinary emergency

The Hungarian emergency law, pushed through the Hungarian Parliament on 30 March gives unlimited decree power to Viktor Orbán to "suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by decree." (Section 2 of the law, see the [full translation here](#) with the "[reasoning](#)" accompanying the law [here](#).) The scope of the law is broad. Orbán may use these emergency powers to "guarantee for Hungarian citizens the safety of life and health, personal safety, the safety of assets and legal certainty as well as the stability of the national economy" (Section 2 of the law). One wonders what reasonable government functions fall outside of this list.

The government's primary defense of the law is that adequate safeguards are in place to control these extreme measures. Justice Minister Judit Varga has been out in front, giving interviews with the international press (see [here](#) and [here](#) and [here](#)) reassuring everyone that the Parliament remains in session. (Last week, for example, the MPs even found time to [ban gender change in the birth register](#) after a person has transitioned from one sex to another as an adult, a law that is now in [direct conflict with case law of the European Court of Human Rights](#).) Varga claims that this hard-working Parliament may cancel Orbán's decrees at any time, as the constitution provides. Moreover, she says, the Constitutional Court remains open to check all decrees for their compatibility with the constitution. As a result, these

emergency powers can be challenged in a normal constitutional way. Yes, Hungary is using emergency powers to deal with the crisis but – Hungarian government officials say – so are other countries in the EU. Hungarian officials are quick to accuse the EU, as they always do, of using “double standards” to single out Hungary for special condemnation.

## The military is taking over

But Hungary’s emergency is not like that of any other country in Europe – or for that matter any country anywhere. Let us mention just a few of the powers that the government has already claimed. No other country has put military commanders at the head of every hospital in the country. Last week, [on the orders of the Hungarian health minister](#), these commanders [cleared 36,000 hospital beds](#) across the country – mostly by ejecting terminally and chronically ill patients from these hospitals and sending them home. Nurses were frantically explaining to family members how to change drips and bandages, how to administer shots, how to look for dangerous turns in these patients’ conditions. And now, of course, tens of thousands of Hungarian families are isolated at home with sick and dying loved ones who should have had hospital care. [Two hospital directors were fired for resisting](#) the government’s orders, which overrode doctors’ assessments of what was best for their patients’ health. Never mind that the real need for beds is about a tenth of the government estimates.

The government has also [inserted the military](#) into at least 150 “strategic” companies to ensure their continued operation through the pandemic. Among the companies now under military direction are [major players in the food business](#) among many others. In addition, [military are now much more visible](#) on the streets. Of course, some countries, like the US, have deployed military units to help fight the pandemic.

But those units are building field hospitals to handle the crush of patients; they are not there for social control or economic guidance purposes, as they are in Hungary.

Orbán has issued about 70 decrees so far with his newly found powers. It is impossible to summarize them all. But to give you a sense of what Orbán is doing with his unlimited power, we might point out Decree 46/2020 which obliterates data protection in Hungary, since it permits the minister for innovation (but why him in a viral emergency?) to access personal data of anyone in Hungary for the purposes of fighting the pandemic. Decree 47/2020 obliterates worker protections in the Labor Code. During the emergency, unlimited freedom of contract will return labor law to the 19<sup>th</sup> century. In the current situation of rapidly increasing unemployment, employees now must accept even inhuman working conditions if they do not want to lose their jobs.

## The Kartonpack case

For the purposes of assessing the state of the rule of law, however, the most alarming and distinctive part of the Hungarian approach to emergency powers is that Orbán’s ability to order these extraordinarily exceptions to Hungarian (and EU) law

are essentially unchecked. Let's take one concrete example to show how the new system works and why both parliamentary and judicial controls on his power – relied on by the Hungarian government to placate critics — fail.

On Friday, 17 April, Orbán issued [decree 128/2020](#), targeting by name Kartonpack, a publicly traded company, for government intervention. The government commissioner in charge of this company (through the military structure Orbán has installed in strategic companies) fired the whole Board of Directors within hours after the decree was issued and replaced them with five new directors, [at least three of whom](#) have held government positions with Orbán's party. The connection between the emergency and this company – which manufactures cardboard boxes, including some for the pharmaceutical industry – is tenuous to say the least. Shareholders in this company were not consulted – despite company law in Hungary that requires shareholder participation in changes to the Board. Instead, shareholders learned about the changes only when [a terse announcement appeared on the webpage of the Budapest Stock Exchange](#) that announced the new directors but did not explain why the changes had to be made. This was not a nationalization of the company. The company retains its legal status as a publicly traded limited liability company. It is just under new, state-directed, leadership.

Suppose that the Parliament or the ousted directors of this company or the shareholders wanted to challenge this order. Minister Varga has assured the EU that such challenges are possible and that the Parliament and the courts retain their oversight of Orbán's decree powers. But, as we will show, any attempted challenge will fail.

## **Parliament has effectively given up the power to control Orbán**

[Under the Fundamental Law in Article 53.3](#), decrees issued in a state of emergency lose their legal force after 15 days unless Parliament affirmatively approves their continuation. But in the Enabling Act, Parliament gave away that power.

Section 3.1 of the Enabling Act explicitly provides that “Parliament authorizes the Government to extend the effect of” the decrees that shall be issued in the name of the emergency. So even though the Parliament has gone on meeting and could have, as the constitution envisions, extended each of these decrees as their expiration date neared, the Parliament instead transferred its power to extend all emergency decrees directly to Viktor Orbán.

We can see the effects of this in the Kartonpack case. Decree 128/2020 authorized the replacement of the Board of Directors of Kartonpack but it did not do so on a temporary basis. The decree made a permanent change in the governing structure of this company even though emergency decrees are supposed to lose their force after 15 days unless Parliament approves. Once Parliament transferred its power to extend these decrees directly to the person who now has the unlimited power to issue these decrees, however, it has no ability to interfere. And decrees can order actions with permanent effect.

So then, one might guess, the Parliament can object to this practice and withdraw the power it gave to Orbán to prolong the emergency measures beyond 15 days by changing the law. The Enabling Act even says in Section 3.2 that Parliament may withdraw this authorization for the government to extend the force of decrees. But the authorization for the government to extend the effect of emergency decrees was in a part of the law (Section 3) that was deemed “cardinal” which, in Hungarian constitutional law terms, means that it requires a two-thirds majority of the MPs present to change it to withdraw the authorization. Yes, Orbán currently controls two-thirds of the seats in the Parliament which means he could ask them to change this provision any time, or repeal the law altogether. But why would he limit his own power? Moreover, as long as he holds his party together, they are unlikely to object in any event. The real problem occurs if and when the Parliament opposes something he does. But this has never happened in the last ten years. Of course, he could lose the two-thirds majority, although not in the wake of by-elections, because they are suspended for the duration of the emergency, but if several Fidesz MPs die. But with that, the opposition is not yet gaining the two-thirds, what would be needed to amend or repeal the law. Can they change the law or revoke the authorization then?

Orbán could do something outrageous enough – for example, taking control of a private company as he did last Friday — to alienate members of his own party. But Orbán has built a safety net for himself into the emergency law so that he can issue decrees modifying any law in Hungary indefinitely. Two-thirds of MPs must now *object* to indefinitely extending any future emergency decrees’ validity by changing or repealing the law that gave Orbán those powers in the first place. And that assumes that the President of the Republic, a Fidesz loyalist who has been friends with Orbán for decades, would not veto such a law. (After all, the Enabling Act itself was signed by the President within two hours of the Parliament’s passage of the law, lest the Parliament have second thoughts.) Orbán therefore only needs to retain the loyalty of one-third of the members of Parliament or the Hungarian President to continue his unlimited decree power indefinitely. Parliament has effectively given up its power to control him.

## **No courts will be involved unless Orbán wants them to be**

To make matters worse, the legal presumption on which both the initial emergency decree 40/2020 and the subsequent emergency statute (the Enabling Act) rest is itself unconstitutional. Decree 40/2020 declared a ‘state of danger’, a special state of emergency regulated by [the Fundamental Law in Article 53](#) to provide exceptional competences to combat natural disasters. But the statute violates the Fundamental Law that was enacted in 2011 with the exclusive support of the governing party. Article 53 of the Fundamental Law mentions only natural disasters and industrial accidents, not pandemics. Legal provisions that regulate pandemics already exist in an ordinary statute, Act 128 of 2011, which further regulates the management of natural disasters. In other words, there was no constitutional authorization either for the decree or for the Enabling Act in the first place. The Enabling Act was

not even needed either to cope with the crisis, since the existing ordinary laws, for instance Act CLIV of 1997 on Health or Act CXXVIII of 2011 on Emergency Management provide ample powers for dealing with a pandemic. For instance, the current curfew requiring people to stay in their houses was ordered without using emergency powers.

But surely, then the courts can get involved – and courts might be more likely to notice the unconstitutionality at the root of the whole system. But courts will not get involved now. Another Orbán decree, [Decree 74/2020](#), now regulates in detail the operation of the ordinary courts under the state of emergency. It was promulgated the day after the Parliament passed its emergency law and it is clear from the scope and scale of the decree that Orbán intends this decree to apply as long as the emergency continues. (And remember, only he gets to say when the emergency ends because Parliament provided no time limits on the emergency itself in the Enabling Act.)

Under Decree 74/2020, the courts can suspend proceedings in any civil case at the request of either party as long as it would be epidemiologically dangerous for people to appear in person. In criminal cases, the prosecutor can decide that a case should be suspended or postponed during the emergency – and the postponement can last until the emergency ends. The decree allows judgments to be rendered outside of a trial, and allows appeals to be determined without a hearing. Moreover, certain cases cannot be brought at all during the emergency, including private prosecutions and cases “claiming compensation.” In Hungary these days, the trial-level courts are effectively closed – or rather selectively opened depending on whether Orbán wants them to be. If the fired members of the Kartonpack board – or for that matter shareholders of the company who are concerned about the takeover – bring a case to the Hungarian courts now to challenge the decree, they are not guaranteed a hearing or any resolution of the case before the emergency ends. Decree 74/2020 provides many opportunities for cases to be delayed indefinitely.

## **No cases will reach the Constitutional Court**

So then what about the Constitutional Court, which according to [the Hungarian Fundamental Law in Article 54.2](#), must remain open for the duration of an emergency? Yes, the Constitutional Court remains open but cases cannot get to it as long as the lower-level courts are closed or severely restricted. The Constitutional Court can receive cases for abstract review if certain named officials (for example, the president, the public prosecutor or the ombudsman) bring a case. But all of those officials are now close allies of the government and they are unlikely to challenge anything that the current prime minister does. There is a possibility that one-quarter of MPs could bring a case, but that would require that the left-opposition work with far-right Jobbik to agree on a challenge. Even if a case could get to the Constitutional Court, however, that court has long since been packed by regime loyalists who are unlikely to disagree with this government.

In short, Judit Varga and other Hungarian government officials are stating true facts – that the Hungarian Parliament is still in session and that the Constitutional Court is still open. But the implication of those statements – that those institutions can control Orbán's power – is simply false. Yes, the Parliament is meeting, but Orbán has claimed the power to issue decrees that escape parliamentary scrutiny and renewal despite the fact that Article 53.3 of Orbán's own constitution – requires the Parliament to remain engaged in oversight during an emergency. In order for Parliament to change this state of affairs, it would have to amend or repeal the emergency law, which would take a two-thirds vote of the Parliament to accomplish.

Even if Parliament could muster such a supermajority to challenge Orbán, his long-time friend, the President of the Republic, can veto that law.

So even if Orbán starts to lose his own supporters, he can carry on his indefinite decree power as long as he holds the loyalty of the one-third of the Parliament and/or the President of the Republic. In addition, with normal judicial procedures altered by decree, the judicial review of Orbán's actions is likely to come too late for it to be effective.

As a result, the oversight mechanisms that the Hungarian government has been pointing to in order to reassure the world that Hungary still honors the rule of law are illusory. Orbán governs as a dictator and no plausible domestic mechanism can now stop him.

Many countries have declared states of emergency to deal with the pandemic. But Hungary's state of emergency is like no other. If Commissioner Jourová still believes that the rule of law is intact in Hungary, she should stop relying on the Hungarian government to tell her that all is well.

